BEST AVAILABLE COPY

QUESTION PRESENTED

Whether section 16 of the Clayton Act permits an antitrust plaintiff other than the federal government to seek mandatory relief, such as divestiture, to remedy claimed injuries caused by a completed acquisition that allegedly violated section 7 of the Clayton Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. The Language Of The Clayton Act Excludes Post Hoc Structural Relief, Like Divestiture, From The Injunctive Relief Available Under Section 16	10
A. On Its Face, The Language Of Section 16 Forecloses The Argument That The Equitable Relief Available To Private Plaintiffs Is Coextensive With That Available To The Federal Government Under Section 15	11
B. The Language Used In Section 16 Does Not Permit Private Plaintiffs To Seek Mandatory Injunctions To "Undo" Completed Antitrust Violations	14
II. Contemporaneous Judicial Interpretations Confirm That The Relief Available Under Section 16 Is Limited To Preventive Injunctive Relief Against Threatened Violations, And Therefore Does Not Include Post Hoc Structural Remedies Such As Divestiture	19
III. The Legislative History Of The Clayton Act Establishes That Congress Both Understood And Intended The Language Of Section 16 To Exclude Post Hoc Structural Relief	22
A. There Is Overwhelming Evidence That Congress Intended To Deny Non-Federal Plaintiffs The Right To Obtain Post Hoc Structural Relief, And That It Implemented That Intent In The Language Of Section 16	23

TABLE OF CONTENTS—Continued

	Page
B. Nothing In The Snippets Of Legislative History Relied Upon By Petitioner Supports The Availability Of Post Hoc Structural Remedies Under Section 16	35
C. Congress Reaffirmed In 1976 That Non-Federal Plaintiffs Do Not And Should Not Have The Authority To Seek Post Hoc Structural Remedies	40
IV. Policy Considerations Counsel Against Interpreting Section 16 To Permit Non-Federal Plaintiffs To Seek Structural Relief	42
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	Page
BankAmerica Corp. v. *United States*, 462 U.S. 122 (1983)	44
Bell v. *New Jersey*, 461 U.S. 773 (1983)	41
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975)	34
Bosse v. *Crowell Collier & MacMillan*, 565 F.2d 602 (9th Cir. 1977)	5
Brown v. *Swann*, 35 U.S. 331 (1836)	12
CIA. Petrolera Caribe, Inc. v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985)	*passim*
Calnetics Corp. v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976)	5
Cargill, Inc. v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986)	10, 22, 32
Colautti v. *Franklin*, 439 U.S. 379 (1979)	8, 12
Comm'rs of Highways v. *Deboe*, 43 Ill. App. 25 (1892)	15
Continental Securities Co. v. *Michigan Cent. R.R. Co.*, 16 F.2d 378 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927)	9, 22
Davis v. *Hartwig*, 195 Mo. 380, 94 S.W. 507 (1906)	15
Duplex Printing Press Co. v. *Deering*, 254 U.S. 443 (1921)	8, 20, 22
East Saginaw St. Ry. Co. v. *Wildman*, 25 N.W. 193 (Mich. 1885)	15
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392 (1988)	24, 37
Federal Energy Admin. v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976)	24
Fleitmann v. *Welsbach Co.*, 240 U.S. 27 (1916)	8, 19, 20, 22
Hallstrom v. *Tillamook County*, 58 U.S.L.W. 4007 (1989)	10
General Investment Co. v. *Lake Shore & Mi. S. Ry. Co.*, 260 U.S. 261 (1922)	8, 20

TABLE OF AUTHORITIES—Continued

	Page
Georgia v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945)	11
Graves v. *Cambria Steel Co.*, 298 F. 761 (D.N.Y. 1924)	8, 21
Gulf Offshore Co. v. *Mobil Oil Co.*, 453 U.S. 473 (1981)	37
International Tel. & Tel. Corp. v. *General Tel. & Elec. Corp.*, 518 F.2d 913 (9th Cir. 1975)	5, 6, 13
McNally v. *United States*, 483 U.S. 350 (1987)	10
Morissette v. *United States*, 342 U.S. 246 (1952)	11
Mountain States Tel. & Tel. v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985)	8, 12
NLRB v. *Fruit Packers*, 377 U.S. 58 (1964)	24, 37
North Dakota v. *United States*, 460 U.S. 300 (1983)	10
Northern Securities Co. v. *United States*, 193 U.S. 197 (1904)	32
Philbrook v. *Glodgett*, 421 U.S. 707 (1975)	34
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946)	12
Red Lion Broadcasting Corp. v. *FCC*, 395 U.S. 367 (1969)	41
Russello v. *United States*, 464 U.S. 16 (1983)	7, 12
St. Francis College v. *Al-Khazraji*, 481 U.S. 604 (1987)	10
Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951)	37
Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, 444 U.S. 572 (1980)	41
Shell Oil Co. v. *Iowa Dept. of Revenue*, 109 S.Ct. 278 (1988)	37
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911)	17, 24, 25, 39
Texas v. *Coca-Cola Bottling Company*, 697 S.W.2d 677 (Tex. App. 1985)	49
United Savings Ass'n of Texas v. *Timbers of Inwood Forest Assocs.*, 108 S.Ct. 626 (1988)	12
United States v. *American Tel. & Tel. Co.*, 552 F. Supp. 131 (1982), *aff'd*, *Maryland* v. *United States*, 460 U.S. 1001 (1983)	17

TABLE OF AUTHORITIES—Continued

	Page
United States v. *American Tobacco Co.*, 221 U.S. 106 (1911)	17, 28, 39
United States v. *Borden*, 347 U.S. 514 (1954)	10, 44
United States v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957)	48
United States v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961)	11
United States v. *Menasche*, 348 U.S. 528 (1955)	12
United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)	44
United States v. *Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026 (1989)	10
United States v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953)	45
Venner v. *Pennsylvania Steel Co.*, 250 F. 292 (D. N.J. 1918)	8, 20, 22
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969)	8, 14, 20

STATUTES AND REGULATIONS

16 C.F.R. § 801 *et seq.* (1989)	1
Clayton Act, § 15, 15 U.S.C. § 25 (1982)	*passim*
Clayton Act, §16, 15 U.S.C. § 26 (1982)	*passim*
Hart-Scott-Rodino Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. § 18a (1982))	*passim*
Sherman Act, Pub. L. No. 94-435, § 301, 90 Stat. 1890 (1976)	*passim*
Me. Rev. Stat. Ann. tit. 10, § 1104(2) (1989 Cum. Supp.)	49

LEGISLATIVE MATERIALS

51 Cong. Rec. H9156 (daily ed. May 23, 1914)	24, 27
51 Cong. Rec. H9261 (daily ed. May 26, 1914)	32
51 Cong. Rec. H9270 (daily ed. May 26, 1914)	38
51 Cong. Rec. S14476 (daily ed. Aug. 31, 1914)	32, 33
51 Cong. Rec. S14477 (daily ed. Aug. 31, 1914)	33
51 Cong. Rec. S14478 (daily ed. Aug. 31, 1914)	33

TABLE OF AUTHORITIES—Continued

	Page
51 Cong. Rec. S14516 (daily ed. Sept. 1, 1914)	33
51 Cong. Rec. S14518 (daily ed. Sept. 1, 1914)	34
51 Cong. Rec. S14519 (daily ed. Sept. 1, 1914)	32
51 Cong. Rec. S14520-21 (daily ed. Sept. 1, 1914)	26, 33
51 Cong. Rec. S14527 (daily ed. Sept. 1, 1914)	34, 40
51 Cong. Rec. S15863 (daily ed. Sept. 28, 1914)	39
51 Cong. Rec. S15864 (daily ed. Sept. 28, 1914)	40
51 Cong. Rec. S15946 (daily ed. Sept. 30, 1914)	35
51 Cong. Rec. S16052-53 (daily ed. Oct. 1, 1914)	40
51 Cong. Rec. H16275 (daily ed. Oct. 7, 1914)	35
51 Cong. Rec. H16319 (daily ed. Oct. 8, 1914)	35
51 Cong. Rec. H16326 (daily ed. Oct. 8, 1914)	40
122 Cong. Rec. H10295-96 (Sept. 16, 1976)	41
Hearings on Trust Legislation Before the House Committee on the Judiciary, 63d Cong., 2d Sess. 54 (1914)	*passim*
H.R. Rep. No. 627, pt. 1, 63d Cong., 2nd Sess. (May 6, 1914)	31
H.R. Rep. No. 627, pt. 2, 63d Cong., 2nd Sess. (May 12, 1914)	37
H.R. Rep. No. 1168, 63d Cong., 2d Sess. (Sept. 25, 1914)	34
H.R. Rep. No. 1373, 94th Cong., 2d Sess. (1976)	47
S. Rep. No. 698, 63d Cong., 2d Sess. (July 22, 1914)	32
S. Rep. No. 803, 94th Cong., 2d Sess. (1976)	41, 47
S. 1284, 94th Cong., 1st Sess. § 401 (1976)	41
A.B. 672, 1989-1990 Cal. Reg. Sess.	49

OTHER AUTHORITIES

ABA Antitrust Section, Monograph No. 15, Antitrust Federalism: The Role of State Law (1988)	49
ABA Antitrust Section, Monograph No. 16, Private Litigation Under Section 7 of the Clayton Act: Law and Policy (1989)	46
J. Adams, *The Doctrine of Equity* (8th ed. 1890)	15

TABLE OF AUTHORITIES—Continued

	Page
Areeda & Turner, *Antitrust Law* (1978)	45, 47
Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955)	45
W. Baumol & S. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 267 (1985)	46
G. Bispham, *The Principles of Equity* (8th ed. 1913)	14, 15, 16, 17
H. Black, *A Law Dictionary* (2d ed. 1910)	16
J. Bouvier, *Law Dictionary and Concise Encyclopedia* (8th ed. 1914)	14, 15, 17, 18
E. Kinter, *The Legislative History of the Federal Antitrust Laws and Related Statutes* (1978)	23, 24
C. Langdell, *A Brief Survey of Equity Jurisdiction* (1908)	15, 21
J. Pomeroy, *A Treatise on Equity Jurisprudence* (3d ed. 1905)	14, 15, 16, 17
Rill, *Antitrust: Where We Stand Today*, 57 Antitrust L.J. 3 (1988)	48
C. Sands, *Sutherland Stat. Const.* (4th ed. 1984)	12, 19
J. Story, *Commentaries on Equity Jurisprudence* (1886)	*passim*
L. Sullivan, *Handbook of the Law of Antitrust* (1977)	18
C. Sweet, *A Dictionary of English Law* (1882)	16
The Washington Post, Oct. 17, 1989	46
von Kalinowski, *Antitrust Laws and Trade Regulation* (1989)	48

STATEMENT OF THE CASE

1. American Stores Co. ("American") is a nationwide grocery retailer. Prior to June 1988, it owned and operated 252 "Alpha Beta" and "Skaggs Alpha Beta" retail grocery stores in California. On March 21, 1988, American publicly announced a $2.5 billion tender offer for the outstanding shares of another nationwide grocery chain, Lucky Stores, Inc. ("Lucky"). At that time, Lucky operated 340 "Lucky Stores" and "Lucky Food Basket" stores in California. American's purpose in acquiring Lucky was to bring its Alpha Beta stores under the Lucky banner and to obtain the substantial cost-saving efficiencies that integration of the two chains would provide. American estimated that this integration would produce shelf price reductions to consumers of $50 million annually. Excerpts of Record ("ER") 393-94.

Immediately after its announcement, American began supplying information to the Federal Trade Commission (FTC) under the Hart-Scott-Rodino ("HSR") Act (15 U.S.C. § 18a), and the FTC's HSR regulations (16 C.F.R. § 801 *et seq.*). On May 31, 1988, after protracted negotiations with the FTC, American entered into a comprehensive consent order. Among other things, it agreed to divest 37 stores in California, dispose of all its Midwest assets, and avoid additional acquisitions in certain parts of California for ten years. To provide time to accomplish these divestitures without postponing consummation of American's cash tender offer, American simultaneously entered into a "hold separate" agreement with the FTC. That agreement required American to operate Lucky as a separate business until the consent decree finally was approved and the divestitures accomplished. This hold separate agreement was explicitly drawn to preserve the FTC's power, as a federal antitrust enforcement agency, to seek divestiture if it should determine not to accept the consent decree or proposed divestitures after public comment. ER 19-20.

On June 2, 1988, American accepted for payment all of the Lucky shares tendered pursuant to American's tender

offer. ER 596. On June 9, American completed its acquisition of Lucky's stock and assets through a short-form merger under Delaware law. Pet. App. A-7; ER 596; Pet. Br. 5. The merger therefore was completed on that date. The FTC gave final approval to the consent agreement on August 31, 1988, after receipt and review of public comments during a 60-day public comment period.

Among those filing public comments was the California Attorney General ("CAG"), which had begun its own investigation of the merger. American had cooperated fully with the CAG during this entire period. Among other things, American furnished the CAG with all the California documents and information it provided to the FTC, and kept the CAG fully informed of the status of the FTC proceedings. Despite several requests, the CAG declined to inform American of his enforcement intentions. ER 596. Nearly three months after American completed the merger by paying $2.5 billion to Lucky shareholders and five months after the beginning of the tender offer, the CAG commenced an antitrust action in the United States District Court for the Central District of California. The suit, which was brought under section 16 of the Clayton Act (15 U.S.C. § 26), alleged that the merger violated section 1 of the Sherman Act as well as section 7 of the Clayton Act. It sought an order requiring American to divest all Lucky stores located in California. Pet. App. A7.

2. After granting the CAG's motion for a temporary restraining order, the district court held a hearing (based entirely upon written testimony) to determine whether a preliminary injunction should issue. In establishing the relevant product market, respondents presented extensive evidence that their grocery retailers faced substantial competition from "mom and pop" retail grocery stores, convenience food stores, warehouse food stores and other grocery vendors in addition to other large national and regional supermarkets. Pet. App. A10. Indeed, respondents demonstrated that less than two-thirds of food

sold for home consumption in California is sold through supermarkets. ER 203, 610. Respondents also proposed 14 individual Metropolitan Statistical Areas as the relevant geographic markets. Based upon these product and geographic market definitions, the combined American/Lucky grocery chains had a market share averaging approximately 19 percent in these 14 markets, *before* divestiture of the 37 stores respondents were required to sell under their agreement with the FTC. ER 114-28. Respondents also presented extensive evidence showing that entry into the grocery retailing business is easy and that such entry would occur swiftly if any grocery chain attempted to raise its prices above competitive levels. Pet. App. A13-A14.

Although the district court accepted respondents' definition of the relevant geographic markets (Pet. App. B11), it rejected respondents' definition of the product market. Instead, it adopted the CAG's definition of the product market, which included *only* large, full-line "supermarkets" that operated in more than 10,000 square feet of building space. Pet. App. B10, A10. This definition was based solely upon the written testimony of the State's two economists, one of whom admittedly had never reviewed any of the market-specific data submitted to the CAG. ER 994. Even under this narrow definition of the market, the market share of the combined American/Lucky chain averaged just 24 percent over the 14 geographic markets accepted by the court. Pet. App. A11, B12. The district court also rejected respondent's showing of low entry barriers. Pet. App. B17; cf. ER 213-14, 611, 658.

Based largely on its interpretation of the Justice Department's merger guidelines (which the FTC presumably applied in approving the consent decree), the district court held that the statistical evidence created a presumption that the merger violated section 7 of the Clayton Act. Pet. App. B12-B14. Respondents' evidence concerning ease of entry was rejected because it was incon-

sistent with the court's own narrow definition of the relevant product market. Pet. App. B17-B18. The district court therefore concluded that the CAG had established a likelihood of prevailing on the merits of its Clayton Act claim. Pet. App. B17-B19.[1] With respect to the requirement of irreparable harm, the district court stated that, because the CAG had shown the possibility of an adverse effect on competition, the CAG had made an "adequate" showing of irreparable injury justifying preliminary injunctive relief. Pet. App. B22. Accordingly, the district court on September 29, 1988, entered a preliminary injunction very similar to the FTC's hold separate order.[2] The court further held that such an injunction was justified because (a) the FTC's hold separate order had prevented completion of the merger, and (b) an order making this injunction permanent would not constitute a divestiture order. Pet. App. B21.[3]

3. The court of appeals affirmed in part and reversed in part. Pet. App. A1-A21. Contrary to petitioner's assertion (Pet. Br. 7), the court of appeals did not "adopt" the district court's findings of fact. Instead, the court of appeals emphasized that its review of the district court's preliminary injunction order was limited to a determination whether the district court had abused its discretion, and the court simply declined to disturb

---

[1] The court did not address petitioner's Sherman Act section 1 claim.

[2] The order required respondents to "take all steps necessary to operate" Alpha Beta "independently of the assets and businesses" of Lucky in the State of California and to "refrain from taking any further steps" to "integrate the assets and businesses" of those two wholly-owned subsidiaries. Pet. App. B25.

[3] Compliance with the injunction during the course of this litigation has been extremely costly, in part because the FTC consent decree required American to divest itself of so many Alpha Beta stores that the remaining stores had difficulty supporting a separate distribution, marketing and advertising operation.

the district court's preliminary findings as to the likelihood of success. Pet. App. A7-A9. But, after reviewing respondents' evidence as to the relevant product market, the court of appeals noted that, "Were we to evaluate independently the evidence of the relevant product market, we might reach a different conclusion." Pet. App. A10. It further stated that, after all the evidence is presented at trial, the district court itself might "come to a different view of the market." *Id.* The court of appeals also found that respondents had made "a compelling case for the easy entry into the market" (*id.* at A13), but it nevertheless declined to hold that the district court was "clearly erroneous" in its determination that American had "not satisfied its burden." *Id.* at A13-A14.

Although it declined to disturb the district court's preliminary factual findings, the court of appeals held that the district court had misapprehended both the law of divestiture and the law of corporate mergers. The court reiterated its 14-year-old rule that, unlike a suit brought by the United States under Section 15 of the Clayton Act (15 U.S.C. § 25), a suit brought by a non-federal plaintiff under section 16 of the Clayton Act may not seek divestiture. Pet. App. A17-A18; see *International Tel. & Tel. Corp.* v. *General Tel. & Elec. Corp.*, 518 F.2d 913, 920-25 (9th Cir. 1975) (*IT&T*); *Bosse* v. *Crowell Collier & MacMillan*, 565 F.2d 602, 607 (9th Cir. 1977) (*Bosse*); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir.) (*Calnetics*), *cert. denied*, 429 U.S. 940 (1976). The court further held that, under Delaware law, the merger had been completed on June 9, 1988, when American acquired the remainder of Lucky's outstanding shares. Pet. App. A19. Thus, the only way to "undo" the merger was through divestiture. *Id.*

The court of appeals held (and petitioner concedes, Pet. Br. 7-8) that the sole purpose of the preliminary injunction order was to preserve the possibility of a

final order of divestiture following trial. Pet. App. A19-A20. Because the district court lacked authority in a lawsuit brought under section 16 to issue a permanent order of divestiture, the issuance of a preliminary injunction designed solely to preserve the right to such relief was an abuse of discretion. Pet. App. A20.[4]

Finally, the court of appeals rejected petitioner's argument that denying it the ability to obtain divestiture would make it difficult or impossible to obtain meaningful relief in merger cases. The court stated:

> We do not believe that our holding puts California in an untenable position in future cases. California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney General chose not to do so. California must accept the consequences of his choice.

Pet. A20-A21.

SUMMARY OF ARGUMENT

This case presents a single, narrow question of statutory construction: whether section 16 of the Clayton Act grants plaintiffs other than the federal government the authority to seek divestiture of a business acquired through a merger, allegedly in violation of section 7 of

[4] The court of appeals correctly held that "there must be some reasonable relationship between the preliminary injunction and the permanent relief requested: the preliminary relief granted should ensure the availability of permissible permanent relief sought." Pet. App. A20.

The court of appeals also held, as an alternative ground for its decision, that the preliminary injunction, in and of itself, improperly imposed "indirect" divestiture because it required American and Lucky to "operate as if Lucky had never been acquired by American Stores at all." Pet. A19, citing *IT&T*, 518 F.2d at 924. The court concluded that entry of any injunction effectively extending the life of the FTC's "hold separate" order improperly permitted California to "bootstrap itself into th[e] remedy" of "divestiture" through a "consent order designed to protect the rights of the FTC, which is entitled to sue for divestiture [under section 15 of the Clayton Act]." Pet. App. A20.

that Act. See Pet. Br. i.[5] Relying almost entirely upon its view of proper antitrust policy, and citing a single snippet of legislative history, petitioner argues that section 16 grants to private plaintiffs (including state attorneys general) the full range of equitable remedies available to the federal government under section 15 of the Clayton Act, including the power to "undo" (Pet. Br. 16) a merger through relief that "address[es] the structured nature of section 7 violations" (Pet. Br. 21).

This argument is belied by the plain language of the Clayton Act. By its terms, section 15 of that Act permits the federal government, without qualification, to institute any "proceeding in equity" and, therefore, to seek any kind of equitable relief. 15 U.S.C. § 25. The language of section 16, by contrast, limits the equiable relief available to a plaintiff other than the federal government to "injunctive relief against threatened loss or damage by a violation of the antitrust laws," and requires that such relief be granted only "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26. Petitioner's attempt to equate the two provisions violates the well-established principle that when Congress uses different language in parallel provisions of the same statute, it intends those provisions to have different meanings. *E.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Petitioner's argument also violates another well-established principle of statutory construction by rendering superfluous the phrases "against threatened loss or damage" and "against threatened conduct that will cause

[5] Petitioner does not challenge any other aspect of the court of appeals' decision. It does not, for example, challenge the court of appeals' conclusion that under Delaware law the merger at issue here was completed on June 9, 1988. And it does not challenge the court of appeals' holding that it was an abuse of discretion for the district court to enter a preliminary injunction designed to preserve the possibility of permanent relief that is legally unavailable. See *supra* at 5-6 & n.4.

loss or damage." *E.g.*, *Mountain States Tel. & Tel.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 248-49 (1985); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979). Petitioner never has explained how such different language in adjacent sections of the Act reasonably can be interpreted to have precisely the same meaning.

In fact, section 16's meaning becomes crystal clear in light of the equity jurisprudence that was well established in 1914, and which section 16 expressly invokes. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969). An analysis of the statutory language in light of relevant equitable principles reveals that the phrases "threatened loss or damage" and "threatened conduct that will cause loss or damage" were designed to (and did) limit the relief available under section 16 to "prohibitory" injunctions. The language thereby excludes "mandatory" or "affirmative" equitable relief, *i.e.*, relief designed to "undo" violations after the fact. Because divestiture—the "undoing" of a merger—is the classic example of mandatory relief, it falls outside the scope of section 16.

This reading of section 16's plain language is confirmed by a number of court decisions interpreting that provision shortly after its enactment. No less than three decisions issued by this Court within the first eight years after passage of the Clayton Act construed the plain language of section 16 to be so limited. *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27, 29 (1916); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 464 (1921); *General Investment Co.* v. *Lake Shore & Mi. S. R. Co.*, 260 U.S. 261, 286 (1922). And, during the first twelve years after the Act's passage, all three lower-court decisions that addressed the precise issue presented in this case—including a decision by Judge Learned Hand— held that divestiture is not available to non-federal plaintiffs because section 16 authorizes only prohibitory injunctions. *Venner* v. *Pennsylvania Steel Co.*, 250 F. 292, 296 (D.N.J. 1918); *Graves* v. *Cambria Steel Co.*, 298 F. 761, 762 (D.N.Y. 1924) (L. Hand, J.); Continental

Securities Co. v. *Michigan Cent. R.R. Co.*, 16 F.2d 378 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927). This consistency among contemporaneous judicial interpretations convincingly confirms Congress's meaning and intent in enacting section 16.

That section 16 is limited to prohibitory injunctive relief is also confirmed repeatedly in the legislative history of the Clayton Act. Numerous legislators, as well as several witnesses (including Louis Brandeis) who testified on the proposed bill, stated that section 16 would not and should not permit a private plaintiff to sue for dissolution of a monopoly, either by divestiture of its component parts or otherwise. And one of the drafters of the Act stated that the drafting committee had "discussed . . . very thoroughly" the question whether a private plaintiff should have the right to sue for such post hoc structural remedies as dissolution, but that "we decided he should not have it." *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d Cong., 2d Sess. 842 (1914) (Representative Floyd). Congress, moreover, explicitly considered and overwhelmingly rejected an amendment that would have permitted state attorneys general to seek all of the equitable remedies available to the federal government under section 15. Thus, although Congress plainly intended to give private plaintiffs (including state attorneys general) the same ability to seek *prohibitory* injunctions as section 15 gave to the federal government, the legislative history demonstrates beyond doubt that Congress meant what it said: non-federal plaintiffs were not to have *all* of the equitable remedies section 15 affords.

This decision, moreover, was based upon compelling considerations of antitrust enforcement policy. Chief among Congress's reasons for denying mandatory relief to non-federal plaintiffs was its view, articulated by several legislators in 1914, that such a potent weapon was best left in the hands of federal antitrust authorities "who are primarily charged by Congress with the duty of

protecting the public interest." *United States* v. *Borden*, 347 U.S. 514, 518 (1954). No doubt, that was one reason why Congress once again specifically refused to grant state attorneys general authority to bring divestiture suits when it enacted the Hart-Scott-Rodino Act in 1976.

In short, petitioner simply disagrees with the policy choice Congress made in 1914, and again in 1976, to deny plaintiffs other than the federal government the authority to seek the kind of broad equitable relief necessary to "undo" a completed merger. If petitioner believes a private divestiture remedy is truly necessary to "fill the gaps" (Pet. Br. 25) in federal antitrust enforcement, it should address its policy arguments to Congress or to its own state legislature, not to this Court.

ARGUMENT

I. The Language Of The Clayton Act Excludes Post Hoc Structural Relief, Like Divestiture, From The Injunctive Relief Available Under Section 16.

The starting point for interpreting any statutory provision is, of course, the language enacted into law by Congress. *E.g.*, *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 109 (1986) (interpreting section 16); *Hallstrom* v. *Tillamook County*, 58 U.S.L.W. 4007, 4008 (1989); *United States* v. *Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1030 (1989); *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983). Obviously, the meaning of words can change over time; for that reason, the terms of a statute enacted in an earlier era must be given their commonly-understood meaning as of that time. *E.g.*, *St. Francis College* v. *Al-Khazraji*, 481 U.S. 604, 610-13 (1987) ("race" in Reconstruction-era statute to be given meaning it had when statute was enacted); *McNally* v. *United States*, 483 U.S. 350, 356-57 (1987) (meaning of "defraud" in mail fraud statute determined as of period when statute enacted). Moreover, if the statute borrows a legal term of art or invokes a well-established, judicially-defined concept, that term or concept should be given the meaning it would have conveyed to a contemporary jurist. *E.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

Ignoring (or perhaps avoiding) these fundamental principles, petitioner advances a legal argument that reduces to the following syllogism: First, the relief available to private plaintiffs under section 16 of the Clayton Act is coextensive with the equitable relief available to the federal government under section 15. Pet. Br. 9, 37, 41.[6] Second, this Court has held that divestiture is available to the government under section 15. *E.g.*, *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961). Therefore, divestiture also must be available to a private plaintiff under section 16. Pet. Br. 9, 11-13.

The fundamental flaw in this argument is its major premise: Even a superficial analysis of the two relevant statutory provisions shows that their language cannot be squared with petitioner's assertion that the explicitly limited relief available under section 16 is coextensive with that available to the federal government under section 15. Moreover, when the Clayton Act is considered in light of contemporaneous principles of equity jurisprudence (which section 16 expressly invokes), it is apparent that Congress intended to (and did) limit the relief available under section 16 to preventive injunctions directed at threatened antitrust violations. This limitation precludes post hoc structural remedies, like divestiture, that are designed to "undo" already-completed transactions.

A. On Its Face, The Language Of Section 16 Forecloses The Argument That The Equitable Relief Available To Private Plainuffs Is Coextensive With That Available To The Federal Government Under Section 15.

Even without close analysis, the premise of petitioner's entire argument runs headlong into two well-established principles of statutory construction. The first is that

---

[6] Petitioner concedes (Pet. Br. 26 n. 5) that it is treated as a private plaintiff for purposes of Section 16. See also *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945).

when Congress uses different language in parallel provisions of the same statute, it intends those provisions to have different meanings. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *United Savings Ass'n of Texas* v. *Timbers of Inwood Forest Assocs.*, 108 S.Ct. 626, 630 (1988) (interpretation of statutes is an "holistic endeavor"). Section 15 of the Act authorizes the federal government, without qualification, to commence any "proceedings in equity" to remedy a violation of the antitrust laws. 15 U.S.C. § 25. By contrast, the relief available to any party suing under section 16 (including private parties and states acting as *parens patriae*) is expressly limited to "injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings." 15 U.S.C. § 26. The fact that Congress used completely different words in section 16 to describe the relief available to litigants other than the federal government creates a powerful and, in this case, entirely unrebutted presumption that different remedial authority was intended.[7]

Second, petitioner's interpretation of section 16 violates the well-established principle that statutes should be read so as to give effect to every word and phrase. *E.g.*, *Mountain States Tel. & Tel.*, 472 U.S. at 249; *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); C. Sands, *Sutherland Stat. Const.* § 46.06 at 104 (4th ed. 1984).

---

[7] Other federal statutes granting authority to seek injunctions—such as Section 13(b) of the Federal Trade Commission Act—contain no such limiting language. See 15 U.S.C. § 45(b) (the Federal Trade "Commission may seek, and after proper proof, the court may issue, a permanent injunction"). Because the language of section 16 explicitly limits the equitable remedies available to non-federal plaintiffs, the general rule requiring broad construction of *unrestricted* grants of equitable jurisdiction does not apply here. Cf. Pet. Br. 10-11, 13 (citing *Brown* v. *Swann*, 35 U.S. 331 (1836); *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946).

Assuming *arguendo* that the phrase "injunctive relief" in section 16 is synonymous with the "equitable relief" provided by section 15—which is by no means clear (see, *e.g.*, *IT&T* v. *GTE*, 518 F.2d 913 (9th Cir. 1975))—petitioner's interpretation renders the qualifying language in section 16 meaningless. Under petitioner's argument, a federal court's authority to issue injunctive relief is limited *only* by the requirement that such relief be issued "when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity." Pet. Br. 10. But petitioner's interpretation studiously ignores the phrases "against threatened loss or damage" and "against threatened conduct that will cause loss or damage," both of which modify "injunctive relief" in the statute.[8]

Petitioner makes no attempt to explain how the limitations in section 16 on the injunctive relief available to private plaintiffs can possibly mean the same thing as the simple grant of authority to initiate "proceedings in equity" contained in section 15. Nor does petitioner make any effort to explain the meaning of the limiting phrases "threatened loss or damage" and "threatened conduct that will cause loss or damage." Accordingly, petitioner's assertion that Congress granted the very same remedial authority to private parties that it granted to the federal government must be rejected.

---

[8] One of petitioner's *amici*, the Center for Public Interest Law, illustrates the flaw in petitioner's argument with disarming simplicity. In trying to bolster petitioner's claims, this *amicus* quotes "the plain wording of section 16" as follows: "Any person . . . shall be entitled to . . . have injunctive relief . . . under the same conditions and principles as . . . granted by the courts of equity . . . ." (Br. 4). With its almost humorous use of elipses, the *amicus* has successfully created the statute petitioner wishes Congress had enacted in 1914. Unfortunately for petitioner, the "plain language" argument advanced by its *amicus* shows precisely how petitioner's proposed interpretation of section 16 has rendered superfluous the two crucial limiting clauses in that provision and, therefore, why petitioner's interpretation of the statute must be wrong.

B. The Language Used In Section 16 Does Not Permit Private Plaintiffs To Seek Mandatory Injunctions To "Undo" Completed Antitrust Violations.

Petitioner has good reason to avoid any close scrutiny of the statutory language. The meaning of section 16's limiting language becomes crystal clear when it is considered in light of well-established equitable principles which were widely understood in 1914, but have fallen into relative desuetude since the merger of law and equity in most American courts. As this Court held in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130 n. 24 (1969), section 16 explicitly invokes those principles by stating that injunctive relief against threatened loss or damage may be granted only "when and under the same conditions and principles as injunctive relief against threatened conduct . . . is granted by courts of equity." Analysis of the relevant body of equity jurisprudence plainly reveals that this language limits the relief available under section 16 to "prohibitory" or "preventive" injunctions, thereby excluding "mandatory" or "restorative" equitable relief—the kind of relief necessary to "undo[]" (Pet. Br. 16) a completed transaction.

1. The distinction between prohibitory and mandatory equitable relief dates back to Roman civil law,[9] and was well-established in 1914 when the Clayton Act was passed. A prohibitory injunction (also called a "preventive," "negative," "restrictive" or "ordinary" injunction), was defined in a well-known 1914 law dictionary as an order "enjoining the *performance* of an unlawful act." J. Bouvier, *Law Dictionary and Concise Encyclopedia* 1569 (8th ed. 1914); see also G. Bispham, *The Principles of Equity* 578 (8th ed. 1913) (prohibitory injunction is "one which is granted for the purpose of restraining the defendant from the *continuance or commission of some act* which is injurious to the plaintiff"); J. Pomeroy, *A Treatise on Equity Jurisprudence* 2665 (3d ed. 1905).[10] As these definitions make clear, a prohibitory injunction could be issued only against unlawful acts that were not yet completed. For that reason, it was often said that a preventive or prohibitory injunction could not be issued to undo an already-completed act or to correct or redress past wrongs. *E.g.*, Bouvier at 1577; *Davis* v. *Hartwig*, 195 Mo. 380, 94 S.W. 507 (1906); *Comm'rs of Highways* v. *Deboe*, 43 Ill. App. 25 (1892); *East Saginaw St. Ry. Co.* v. *Wildman*, 25 N.W. 193 (Mich. 1885); J. Story, *Commentaries on Equity Jurisprudence* 182 (1886).

[9] J. Story, *Commentaries on Equity Jurisprudence* 185 (1886) (discussing Roman law distinction between prohibitory and "restitutory" interdicts); see also J. Pomeroy, *A Treatise on Equity Jurisprudence* 2665 n. 1 (3d ed. 1905).

By contrast, a mandatory injunction (also called an "affirmative" or "restorative" injunction) was one that "compels the defendant to *restore things to their former condition*, and virtually directs him to perform an act." Bispham at 574 (emphasis added). Like other kinds of "affirmative" equitable relief, including dissolution,[11] a mandatory injunction was not issued to halt the commission or continuance of an injurious act, but rather to "undo" acts that had already been completed, or to require the fulfillment of neglected duties. *E.g.*, Pomeroy at 2697 (mandatory injunction compels a defendant to "undo" wrongful act); Story, *supra*, at 182 n.(a) (mandatory injunction "employed to undo what has been done"). Because they were so much more intrusive than prohibitory injunctions, and because they were more difficult to enforce, mandatory injunctions were "granted only with great caution" (Bispham at 577) and "resorted to rarely" (Bouvier at 1570). See generally C. Langdell, *A Brief Survey of Equity Jurisdiction* 33-38 (1908).

The distinction between prohibitory and mandatory relief is well illustrated with an example used by several

[10] The term "injunction," standing alone, generally referred to a prohibitory injunction in 1914. *E.g.*, Bouvier, *supra*, at 1569.

[11] *E.g.*, J. Pomeroy, *A Treatise on Equity Jurisprudence* § 1337-1421 (3d ed. 1905); J. Adams, *The Doctrine of Equity* 239-43 (8th ed. 1890) (extended discussion of dissolution).

turn-of-the-century commentators. Assume that a property owner proposed to build a wall located so that it would darken a neighbor's windows, an action that would constitute a nuisance at common law. *E.g.*, Story at 229-30. If the neighbor brought an equitable action before construction began, he could obtain a prohibitory injunction enjoining the building of the wall. Similarly, if the neighbor brought an action during construction, he could obtain a preventive injunction enjoining *further* construction, that is, preventing the continuation of ongoing, illegal conduct. But if the neighbor wanted the wall torn down (whether it was fully or partially completed), he would have to obtain a mandatory injunction requiring the owner of the wall to remove it. *E.g.*, C. Sweet, *A Dictionary of English Law* 432 (1882); H. Black, *A Law Dictionary* 626-27 (2d ed. 1910). Such an injunction might be issued in a negative or prohibitory form, but it was still considered mandatory if it required the defendant to "undo" the prior act of building the wall.[12] Whether an injunction is mandatory or prohibitory, therefore, turns on whether the *act* that is the subject of the order can still be said to be *threatened* or instead has already been completed.[13] It does not turn on the technical form of the order itself.

---

[12] The court of equity could issue such an order in any of three forms: (1) it could directly command the defendant to take down the wall; (2) it could prohibit him from refusing to take down the wall; or (3) it could prohibit him from permitting his previous wrongful act (in building the wall) to continue. *E.g.*, Black, *supra*, at 626-27. But, regardless of its form, the order would have been considered a mandatory injunction because its effect was to require the defendant to "undo" the prior unlawful act. *Id.* at 627; Bispham, *supra*, at 574 (under old practice, form of mandatory injunction was not "direct in its terms; but the end was reached by a writ apparently prohibitory"); Pomeroy at 2665 ("mandatory injunction . . . always by its language prohibits the continuance of an act or of a structure, although in effect and in its essential nature it is wholly restorative, and compels the defendant to restore the thing to its original situation").

[13] In describing the kinds of wrongs that could be remedied through injunction, equity treatises frequently distinguished between "actual" or "existing" wrongs and "threatened" wrongs. *E.g.*, Pomeroy at 2681-82 (distinguishing between threatened and actual waste, and between threatened and existing nuisance); *id.* at 2685 ("actual" versus "threatened" interference with easements and equitable servitudes).

For purposes of the distinction between prohibitory and mandatory equitable relief, moreover, it is irrelevant that a completed illegal act—a fully constructed wall, for example—might continue to produce injury after its completion. Indeed *no* equitable relief could be issued against a completed act unless that act continued to cause some injury; otherwise legal remedies (*i.e.*, damages) would be adequate, and equitable relief would therefore be unavailable. *E.g.*, Bouvier at 1572; Bispham at 579; Story at 230; Pomeroy at 2667. Thus, even if completed actions produce continuing injury, they can be "undone," if at all, only through mandatory relief.

2. The distinction between prohibitory and mandatory or "affirmative" relief is also well illustrated by the various kinds of equitable relief issued against antitrust violations. For example, an order prohibiting an alleged monopolist from charging predatory prices or otherwise exercising monopoly power is a form of prohibitory relief. But an order "breaking up" or "dissolving" an alleged monopoly is archetypical affirmative or mandatory relief, as that phrase was understood in 1914 and for centuries before, because it seeks to "undo" what has already been done. See *infra* 19-21; see also *United States* v. *American Tel. & Tel.*, 552 F. Supp. 131, 166 (1982), *aff'd*, *Maryland* v. *United States*, 460 U.S. 1001 (1983); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 184-188 (1911); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 77-82 (1911). A divestiture order, which (to borrow petitioner's own description) is "an injunction mandating divestiture of assets acquired in violation of section 7" (Pet. Br. 10), likewise is mandatory relief. Indeed, divestiture of assets is simply one means by which an alleged monopoly may be dissolved (*e.g.*, 221 U.S. at 186), and the term "disolution," as used in 1914, therefore in-

cluded divestiture (*id.* at 187; see *infra* at 25, n. 18). Both remedies, moreover, can be characterized as post hoc structural relief, *i.e.*, "relief addressing the structural nature" of an already-completed transaction (Pet. Br. 21). See also L. Sullivan, *Handbook of the Law of Antitrust* 142-47 (1977) (discussing distinction between remedies aimed at conduct and those aimed at structure).

3. Viewed in this context, the equitable relief Congress made available to private plaintiffs when it enacted section 16 did not and does not include mandatory injunctive relief. First, the injunctive relief available under that provision can be issued only "against threatened loss or damage by a violation of the antitrust laws"—that is, the relief must be designed to prevent threatened injury arising from an antitrust violation, not to redress loss or damage arising from a completed violation of the antitrust laws.[14] Second, the injunctive relief provided by section 16 can be issued only against "threatened conduct," *i.e.*, conduct that has either not yet begun at all or that has already begun yet "threatens" to continue. Mandatory relief, by contrast, *requires* that certain conduct be taken to redress or "undo" prior completed acts (*supra* at 14-15). It therefore cannot accurately be said to be granted against "threatened conduct," *i.e.*, conduct that has either not yet begun at all or that has already begun and "threatens" to continue.

This limitation on the kinds of equitable or injunctive relief that may be issued in a section 16 suit necessarily

[14] The "threatened loss or damage" language cannot be explained as merely limiting the issuance of an injunction to cases in which some harm will occur absent the injunction. Pet. Br. 8, 10. Other language in section 16 expressly states that injunctions granted under that section are to be governed by standard equitable principles, and one of those principles is that an injunction can issue only if there is no adequate legal remedy for the alleged wrong. *E.g.*, J. Bouvier, *Law Dictionary and Concise Encyclopedia* 1572 (8th ed. 1914); *supra* at 9. If legal remedies are inadequate, by definition, some harm to the plaintiff will occur unless an injunction is issued.

means that private plaintiffs may not seek post hoc, structural remedies such as divestiture. See *infra* at 19-22 (discussing cases). As previously noted (*supra* at 17) a divestiture order does not merely prohibit threatened conduct. Rather, it "mandates" (Pet. Br. 10) an affirmative alteration of the status quo, namely, the "undoing" (Pet. Br. 16) of an already-completed merger or acquisition.

II. Contemporaneous Judicial Interpretations Confirm That The Relief Available Under Section 16 Is Limited To Preventive Injunctive Relief Against Threatened Violations, And Therefore Does Not Include Post Hoc Structural Remedies Such As Divestiture.

This conclusion is further confirmed by court decisions interpreting section 16 shortly after it was enacted. Such contemporaneous court interpretations are an "invaluable aid" in determining meaning of a statute. C. Sands, *Sutherland Stat. Const.* § 49.03 at 353 (4th ed. 1984). The early decisions uniformly held that section 16 authorizes only preventive injunctive relief, and therefore does not permit plaintiffs, other than the federal government, to seek post hoc structural relief.

1. The earliest decision of this Court interpreting section 16 was *Fleitmann* v. *Welsbach Co.*, 240 U.S. 27 (1916), decided two years after passage of the Clayton Act. There, a shareholder of a particular corporation had instituted a suit *in equity* for treble damages against third parties under section 7 of the Sherman Act because the corporation itself, which alone could institute a treble damage action at law, declined to do so. After concluding that the shareholder's equitable suit had been properly dismissed under the Sherman Act, the Court also held that such a suit (which would have been considered a suit for restitution, a form of mandatory equitable relief) would not lie under section 16 of the Clayton Act because the relief it sought was not preventive in nature: section 16, according to the Court, "does not go farther in terms than to give an injunction to private persons against threatened loss." *Id.* at 29.

The next decision of the Court interpreting section 16 was *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921), which also involved a suit for an injunction (this time against a secondary boycott) filed prior to the passage of the Clayton Act. The Court concluded that section 16 could properly be applied to previously pending suits, in part because the equitable relief available under the statute applied only to prevent future acts. Referring to section 16's provision for injunctive relief "against threatened loss or damage," the Court stated, "[o]bviously, this form of relief operates only *in futuro*." *Id.* at 464. See also *General Investment Co.* v. *Lake Shore & Mi. S. R. Co.*, 260 U.S. 261, 287 (1922) (section 16 enables plaintiffs threatened with loss or damage to maintain suits to "enjoin" (*i.e.*, prevent) threatened violations).[15]

2. Shortly after passage of the Clayton Act, several lower courts addressed the precise question in this case, *viz.*, whether section 16 permits a suit for divestiture. The first such decision was *Venner* v. *Pennsylvania Steel Co.*, 250 F. 292 (D.N.J. 1918), which involved the acquisition of the Pennsylvania Steel Company of New Jersey by Bethlehem Steel. A shareholder of Pennsylvania Steel sued under section 16 to "set aside" the acquisition. Citing this Court's decision in *Fleitmann* v. *Welsbach*, *supra*, the district court dismissed, holding that "[t]he suits covered by [section 16] are limited to those seeking preventive relief; *i.e.*, injunction 'against threatened loss or damage.'" *Id.* at 296. The court continued:

[15] This Court has continued to recognize this limitation on the equitable relief available under section 16. Most recently, in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), the Court stated that injunctive relief may be granted under section 16 as long as the plaintiff "demonstrate[s] a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Id.* at 130. This description of the relief available under section 16 is virtually identical to Bispham's definition of a prohibitory injunction. See *supra* at 14.

> No other equitable suits, at the instance of private parties are expressly authorized by the Clayton Act; and, as the relief sought in the present supplemental bill is not of a preventive character but to annul a consummated transaction, none of the venue provisions of the Sherman or Clayton Acts is available to [the plaintiff] under that bill.

Id.

Six years later, Judge Learned Hand reached the same conclusion in a virtually identical case involving another acquisition by Bethlehem Steel. *Graves* v. *Cambria Steel Co.*, 298 F. 761 (D.N.Y. 1924). Judge Hand began by noting that section 16 had been enacted "to fill a hiatus left in the Sherman Act, under which the courts had held that private suits [in equity], as distinct from private actions [*i.e.*, actions at law], did not lie." *Id.* at 762. Hand continued:

> When Congress came to amend that situation, they expressly limited the equitable relief to injunctions for threatened loss or damage. That was language apt, and apt only, to answer the case of a *threatened* multiplicity of torts at law. With the knowledge before it of the prior attitude of the courts toward the [Sherman] statute, there can be no question that the words were used in the conventional sense which tradition would impute to them.

Id. (emphasis added).[16] On that basis, Judge Hand concluded as follows:

> The suit at bar, whatever else it is, is not a suit for an injunction [within the meaning of section 16]; indeed, it is really a suit for the dissolution of a monopoly pro tanto. I cannot suppose that any one would argue that a private suit for dissolution would lie under section 16 of the Clayton Act.

[16] Judge Hand's reference to a "threatened multiplicity of torts at law" was an allusion to the most common situation calling for an injunction, namely, a common-law nuisance which, once begun, would create ongoing, cumulative claims for damages. See Langdell, *supra*, at 21, 34-35; Story, *supra*, at 229-30.

Id. Thus, Judge Hand, like the court in *Venner*, held that divestiture was not available because "the words" of section 16, "used in the conventional sense which tradition would impute to them," authorized only preventive injunctive relief.

The Sixth Circuit reached the same conclusion two years later in *Continental Securities Co.* v. *Michigan Cent. R.R. Co.*, 16 F.2d 378 (6th Cir. 1926), *cert. denied*, 274 U.S. 741 (1927). Relying on section 16's limiting language, that court rejected a divestiture suit by a disgruntled shareholder because the plaintiff was alleging a violation "which took permanent shape as a completed act some time before the bill was filed." *Id.* at 379. The court stated:

> The main remedy sought is dissolution of the combination. Section 16 never has been held to reach such a case. The result sought is practically the same as would be asked for in a suit by the Attorney General [under section 15].

Id.

In short, *all* of the early lower court decisions addressing the question squarely held that section 16 does not authorize a private plaintiff to seek post hoc structural relief, and did so on the ground that section 16 (as the Supreme Court had held in *Fleitmann* and *Deering*) by its plain language does not provide for mandatory relief. This unanimity among contemporaneous interpretations is compelling evidence of Congress' meaning and intent in choosing the limiting language in section 16.

III. The Legislative History Of The Clayton Act Establishes That Congress Both Understood And Intended The Language Of Section 16 To Exclude Post Hoc Structural Relief.

This Court has previously relied upon the legislative history of the Clayton Act in determining the meaning of section 16. See *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 112 (1986). That history confirms that Congress clearly understood and intended section 16

to include only preventive relief, thereby excluding divestiture and other post hoc structural remedies. Indeed, the legislative history demonstrates that the draftsmen and sponsors of the Clayton Act considered whether plaintiffs other than the federal government—including, in particular, the states—should be permitted to seek divestiture or dissolution, and expressly concluded that they should not. On the other hand, none of the snippets of legislative history relied upon by petitioner remotely supports a contrary conclusion. Petitioner's arguments, moreover, are directly undermined by Congress's refusal in the Hart-Scott-Rodino Act to permit states to seek divestiture.

A. There Is Overwhelming Evidence That Congress Intended To Deny Non-Federal Plaintiffs The Right To Obtain Post Hoc Structural Relief, And That It Implemented That Intent In The Language Of Section 16.

To appreciate the clarity of Congress's decision to limit section 16, it is helpful to review the legislative history in chronological order. Accordingly, we first discuss the hearings held on Congressman Clayton's proposed bill by the House Judiciary Committee in early 1914.[17] We then analyze the committee reports issued by both the House and Senate committees, as well as associated floor debates. Finally, we discuss the floor debates on the conference committee bill. What is striking about this history—and dispositive for this case—is that at each stage, Congress made clear its intent to deny to private plaintiffs the authority to seek mandatory injunctive relief, including divestiture.

1. Representative Clayton, Chairman of the House Judiciary Committee, commenced hearings on trust legislation on December 9, 1913. *Hearings on Trust Legislation Before the House Committee on the Judiciary*, 63d

---

[17] The Senate held no hearings on the proposed legislation. See E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 1010 (1978).

Cong., 2d Sess. 53 (1914) ("*House Hearings*"). In January, committee prints of four tentative bills were prepared for consideration by the Committee. Those bills had been prepared by a subcommittee of the Judiciary Committee consisting of Representatives Floyd and Carlin along with Chairman Clayton. 51 Cong. Rec. H9156 (daily ed. May 23, 1914). The first of those bills proposed to add to the eight sections of the existing Sherman Act a new section 13 which, with minor irrelevant modifications, was ultimately enacted as section 16 of the Clayton Act. *House Hearings* at 1567-83.

The House hearings are unusually significant for two reasons. First, inasmuch as those hearings were held to consider a fully drafted bill which contained the very language at issue here, the discussion of that section of the proposed bill at the hearings indicates how the language of that provision was understood by competent lawyers at the time. Those lawyers included the well-known antitrust lawyer and later Associate Justice of this Court, Louis Brandeis, who testified as the spokesman for the Wilson administration.[18] Second, Representatives Clayton, Floyd, and Carlin—the draftsmen and sponsors of the proposed bill—were also the principal questioners at the hearings; their statements and questions, therefore, provide substantial insight into their intent, and by extension the intent of Congress, in enacting section 16. *E.g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S.Ct. 1392, 1402 (1988) ("It is the sponsors that we look to" when interpreting statutory language); (quoting *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964); *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (views

[18] Brandeis had been a leading force in the movement to amend the Sherman Act in the wake of the Supreme Court's *Standard Oil* decision. He had also participated in the drafting of earlier proposals to amend the Sherman Act, specifically the so-called La-follette-Lenroot bills. See Kintner at 994, 997-1002.

of draftsmen entitled to considerable weight in determining intent of statute).

One of the first witnesses to testify about the proposed private-injunction provision was Felix H. Levy, a New York antitrust lawyer, who testified before the Committee on February 3, 1914. Levy thought that even in its limited form, section 16 "is rather dangerous, as giving power to individuals which could be readily misused." *House Hearings* at 260. Representative Carlin responded as follows:

> Mr. CARLIN. The criticism we have had with reference to that section is that it does not go far enough.
>
> Mr. LEVY. Not giving the individual sufficient rights?
>
> Mr. CARLIN. That is to say, it has been contended by some that we ought to give the individual the *same* right to sue for an injunction that the Government enjoys.

Id. (emphasis added). Carlin then referred to proposals—never enacted—that would specifically have permitted individuals to sue for "dissolution," as well as a proposal that also would have given the individual the right to implead the government in such a suit. *Id.* at 261; see also *id.* at 650 (discussing proposals). Levy replied that such proposals were "entirely unnecessary" in light of the government's own power to bring equitable actions and its willingness "to put at the service of individuals the machinery of the Department of Justice under the Sherman law." *Id.* at 261; see also *id.* at 263 (statement by Representative Floyd that section 16 would not permit dissolution suits, *e.g.*, suits "involving the whole power of the Standard Oil Co.")

The next witness to address the proposed private-injunction provision was another New York antitrust lawyer, Samuel Untermeyer, who testified on February 6, 1914. Untermeyer had suggested that a private person should be given the right to seek dissolution, subject to the federal government's having an option to take con-

trol of the litigation.[19] Representative Floyd's response to this proposal reflects Congress' intent to deny private plaintiffs the authority to seek post hoc structural remedies:

> Mr. FLOYD: We did not intend by [section 16 of the Clayton Act] to give the individual the same power to bring a suit to dissolve the corporation that the Government has.
>
> Mr. UNTERMYER: He ought to have it.
>
> Mr. FLOYD: We discussed that very thoroughly among ourselves, and *we decided he should not have.*

Id. at 842 (emphasis added). In response, Untermyer argued that what individual plaintiffs really needed was a remedy *not* against threatened *conduct*, but against the "very existence" of a corporation or combination that causes injury:

> Mr. FLOYD: This provision [section 16] was intended to give an individual that was being injured by one of these unlawful combinations or corporations, who had a right under section 7 of the act to recover threefold damages in case he was injured—
>
> Mr. UNTERMYER: I understand.
>
> Mr. FLOYD (continuing): The right to enjoin them from doing these things to his business, and, in their general operation, to enjoin them under section [16] of this act, in so far as their unlawful *operations* affected him individually.
>
> Mr. UNTERMYER: But the very existence of the combination may be the only and vital thing that affects them. That is, the fact that unlawful combination is doing business . . . . *It may not do any overt act at all*, and generally does not, but it is the fact that it exists in violation of law that injures

[19] The remedy of dissolution or the "breaking up" of a monopoly —includes what we call divestiture. See *supra* 17-18; see also *House Hearings* at 689 (Brandeis' discussion of the Union Pacific Case); 51 Cong. Rec. S14520-21 (daily ed. Sept. 1, 1914) (Letter from Attorney General's office explaining recent antitrust cases and consent decrees).

> him. In nearly all the private suits for damages that have been brought that has been the gravamen of the claim. . . . There is no reason why a private individual should not be able to stop that sort of a violation . . .
>
> • • • •
>
> The point is here, that *the very relief that the man needs nine times out of ten is the dissolution of the corporation, because, as I say, it may not be doing any specific act of illegality, but its very existence, in violation of law, is the thing that is injuring him*; and therefore he ought to have the right to begin the suit.
>
> Mr. CARLIN: You approve of this section as far as we have gone, but think it ought to have gone further?
>
> Mr. UNTERMYER: Yes.

House Hearings at 842-46 (emphasis added); see also *id.* at 963 (statement by another witness that section 16, as drafted, permitted an order only to "enjoin the doing of a particular act," and did not extend to dissolution). Despite Mr. Untermyer's urging, the section never was amended to "go further" than prohibitory injunctions against specific, illegal "overt acts."[20]

[20] In *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), the First Circuit makes two unsuccessful attempts to minimize the importance of this exchange: *First*, the court relies upon the fact that committee hearings had "been in session barely one week," and on that basis asserts that "[i]t is difficult to believe that a commitee intention had been formed at this early stage." 754 F.2d at 426. But the critical point of the Carlin-Untermyer exchange is that the *language* used in the Committee's draft of section 16—the same language Congress ultimately enacted —was understood clearly as not permitting an individual to sue for dissolution. In any event, the Committee had had ample time to form an intent on the issue inasmuch as the Committee (or at least a subset of the Committee, see 51 Cong. Rec. H9156) had already drafted proposed legislation before the hearings began, and, indeed, had been considering similar legislation for some time prior to 1914. *Second*, the First Circuit maintains that, "regardless what weight is accorded these remarks," Representative Floyd's statement is not dispositive on the availability of divestiture because divesti-

On February 12, 1914, the Committee heard testimony from Gustavus A. Rogers, another New York attorney. Rogers told the story of a monopoly in the film industry that had driven competitors out of business by invoking certain termination clauses in film licensing agreements. *House Hearings* at 471-84. When Rogers mentioned that some of the competitors had attempted to get an injunction compelling the monopoly to deal with them again, Representative Carlin asked him what he thought of the private-injunction provision in the proposed bill:

> Mr. CARLIN. You approve that provision in the bill?
>
> Mr. ROGERS. The provision that an individual may have equitable relief?
>
> Mr. CARLIN. Yes.
>
> Mr. ROGERS. *I go a step further.* In order to clarify the situation *I would have that language read that the courts are empowered to issue mandatory injunctions* compelling persons complained of to maintain trade relations with others, where the charge is made that the purpose of the refusal to maintain those trade relations is to get rid of a competitor and to further a monopoly.

House Hearings at 484 (emphasis added). Representative Carlin, however, attempted to persuade Rogers that the purely *preventive* relief provided by the proposed section 16 was sufficient to meet the evil he had described:

> Mr. CARLIN. The real trouble with your business was in the combination and formation of the [monopolist's] rental company . . . . If that company could have been *prevented* you would have had the right

---

ture (for reasons not explained by the First Circuit) is substantially different from dissolution. But it is apparent from several portions of the legislative history that "dissolution" was a generic term that includes what we now call divestiture. See *supra* n. 18. Moreover, the fact that an injunction was used as a means to implement dissolution in *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185-86 (1911) (see 745 F.2d at 428) is irrelevant because that injunction was, in substance, mandatory rather than prohibitory.

> to an equitable injunction [under the proposed bill]. When that was done you would not have had any trouble at all.
>
> Mr. ROGERS. There would have been some trouble, but the combination would not have put the hundred and odd companies out of business.

Id. (emphasis added). Later, Representatives Nelson (another member of the Judiciary Committee) and Carlin had the following exchange with Mr. Rogers:

> Mr. NELSON. You have had a great deal of experience with a trust. *This tentative bill No. 1, in section [16], would have given you, had it been in force, injunctive relief only. Would it not have helped you if you could have brought suit for the dissolution of that trust? This section only gives you injunctive relief.*
>
> Mr. ROGERS. Well, I think I could answer that by saying that I think at common law we would have a right that would be analogous to the institution of a suit for dissolution. At common law you can restrain a conspiracy as such . . . . *But even if we could restrain them from carrying out this conspiracy, that is where we would have to stop. That would be negative relief. We could not get affirmative relief. . . .*
>
> Mr. CARLIN. Mr. Untermeyer suggested to this committee that we ought to give the individual the right to sue for dissolution and to interplead the Government in that suit. *The committee had not thought to up to this time. This [proposed bill] does not give the individual the right to sue for dissolution.*
>
> Mr. ROGERS. *Naturally, no.*

Id. at 491-92 (emphasis added). This exchange again makes clear that section 16 was understood as limited by its terms to negative relief"—*i.e.*, preventive relief—and as not extending to "affirmative relief" such as dissolution.

Louis Brandeis testified on February 16, 1914. Brandeis was asked by Representative Carlin to comment on a proposal to create a private right to sue for dissolution.

Carlin phrased the question in a way that makes absolutely clear the understanding that section 16, as drafted, would not permit a plaintiff other than the federal government to sue for such post hoc structural relief:

> A great many suggestions have been made to us with reference to these two sections, [sections 15 and 16]. Now, section [16] is one which gives the individual the right to injunctive relief. It has been suggested to us that we ought to give the individual the right to file a bill in equity for the dissolution of one of these combinations, the same right which the Government now has and which it is its duty to perform. What do you think of that suggestion?

House Hearings at 649. Brandeis stated that the proposal referred to by Carlin was "not a sound one." He continued:

> It seems to me that the *right to change the status*, [of the combination] which is the right of dissolution, is a right which ought to be exercised only by the Government, although the right for full redress for grievances *and protection against future wrongs* is a right which every individual ought to enjoy.
>
> Now, all of this procedure ought to be made so as to facilitate, so far as possible, the enforcement of the law in aid, on the one hand, of the Government, and in aid, on the other hand, of the individual. But that fundamental principle is correct, that *the Government ought to have the right, and the sole right, to determine whether the circumstances are such as to call for a dissolution of an alleged trust.*
>
> • • •
>
> It seems to me that if those suggestions were adopted that any citizen, instead of the Department of Justice, would be charged with the administration of the law.

Id. at 649-50 (emphasis added). In addition to indicating Brandeis' understanding that the statute as proposed (and ultimately enacted) did not permit private plaintiffs to seek dissolution, Brandeis' statement clearly illustrates the well-established distinction between post hoc

structural remedies (*i.e.*, those affecting the "status" of a defendant) and remedies enjoining threatened conduct (*i.e.*, those protecting against "future wrongs").

2. On May 6, 1914, the Clayton Act was favorably reported (with certain amendments not relevant here) to the floor of the House. The Committee report fully supports the conclusion that the private-injunction provision was limited to prohibitory relief. That report described the purpose of that provision as follows:

> Under section 7 of the [Sherman] act, a person injured in his business and property by corporations or combinations acting in violation of the Sherman antitrust law, may recover loss and damage for such wrongful act. There is, however, no provision in the existing law authorizing a person, firm, corporation or association to enjoin *threatened loss or damage* to his business or property *by the commission of such unlawful acts*, and the purpose of this section is to remedy such defect in the law.

H.R. Rep. No. 627, Pt. 1, 63 Cong., 2d Sess. 21 (May 6, 1914) (emphasis added). The report thus makes clear what is clear from the language of section 16 itself: that the private injunction remedy reaches only *threatened* loss or damage by the commission of unlawful acts.

The reading of the committee report was followed by a floor statement by Representative McGillicuddy, a member of the House Judiciary Committee, on May 26, 1914. After observing that the existing Sherman Act provided no mechanism by which a business threatened by a monopoly could prevent "threatened loss or damage," Representative McGillicuddy stated:

> The proposed bill [section 16] solves this problem for the person, firm, or corporation threatened with loss or damage to property by providing injunctive relief against the *threatened act that will cause such loss or damage*. Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy.

51 Cong. Rec. H9261 (daily ed. May 26, 1914) (emphasis added). See also *Cargill*, *supra*, 479 U.S. at 112 (quoting same passage). Like the Report itself, McGillicuddy's statement describes section 16 as explicitly limited to "injunctive relief against the *threatened act* that *will cause* such loss or damage," that is, to prohibitory rather than mandatory relief.

3. The Senate Judiciary Committee held no hearings on the proposed legislation, and the Senate Report contains nothing of relevance here. See S. Rep. No. 698, 63d Cong., 2d Sess. (July 22, 1914). The full Senate, however, debated the proposed legislation at length. The most significant feature of that debate for purposes of this case was the resounding *defeat* of a proposed amendment that would have explicitly granted to state attorneys general the authority to seek post hoc structural remedies.

On August 31, 1914, Senator Reed of Missouri proposed an amendment to the Clayton bill providing that "the attorney general of any State may . . . bring suit in the name of the United States to enforce any of the antitrust laws." 51 Cong., Rec. S14476 (daily ed. Aug. 31, 1914). Such a provision would have permitted a state attorney general, like the federal government, to sue for any kind of equitable relief under section 15 of the Act and, in particular, for dissolution.[21] This pro-

[21] According to Senator Reed, the primary purpose of this proposal was to remedy what some Senators viewed as unduly cautious enforcement of the Sherman Act by the Department of Justice. 51 Cong. S14519 (daily ed. Sept. 1, 1914) (Senator Reed) ("the enforcement of the Sherman Antitrust Act has been a farce, a sham, and a disgrace to our jurisprudence"). And the principal complaint against the Justice Department articulated during those debates was its alleged failure to pursue structural remedies with sufficient vigor. Senator Nelson of Minnesota, for example, pointed to *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904), as an example of a dissolution case that had been brought only reluctantly by the Department of Justice, and which could have been brought by the attorney general of Minnesota if Senator Reed's proposed amendment had been in effect at that time. 51 Cong. Rec. S14476, 14478 (daily ed. Aug. 31, 1914). And Senator Reed, quoting the private secretary to former Attorney General McReynolds, decried the Justice Department's "'failure to insist upon a real dissolution of monopolies and combinations which the courts had adjudged unlawful.'" 51 Cong. Rec. S14520 (daily ed. Sept. 1, 1914) (Sen. Reed). Thus, one of Senator Reed's motives in proposing the amendment was to permit state attorneys general to sue for dissolution.

posal, however, was roundly criticized by a number of Senators who echoed Brandeis' view that the "administration" of the antitrust laws primarily resides with the Department of Justice. See *supra* at 30; 51 Cong. Rec. S14477 (daily ed. Aug. 31, 1914) (Senator White). Senator Lewis argued that partisan politics could well lead to enforcement chaos under Senator Reed's proposal:

> You will have a Republican Attorney General instituting litigation not in harmony with the Democratic State attorneys general . . . and perhaps founded on political considerations. You will have a conflict ceaselessly going on, with the public being ground between the upper and the nether millstones.

51 Cong. Rec. S14476 (daily ed. Aug. 31, 1914) (Senator Lewis). Other Senators noted the possibility that providing such authority to state attorneys general might produce inconsistent court orders (*id.* at S14477 (Senator Gallinger)), might create barriers to effective prosecution by the federal government (*id.* (Senator White); *id* at S14514 (Senator Chilton)), and would amount to a "confession of our inability through the Department of Justice to prosecute the suits that belong to that department" (*id.* at S14516 (Senator Gallinger)).[22] Another Senator noted that because it would cede primary responsibility for enforcement of a federal statute to the states, the proposed amendment was "an innovation unheard of and

[22] Senator White also asked the following rhetorical question: "If this amendment is correct in principle, should we not also enact a law saying that whenever the governor of any State differs with the President of the United States about the enforcement of Federal laws or handling Federal questions, the matter should be left to the governor of the State?" 51 Cong. Rec. S14516 (daily ed. Sept. 1, 1914).

unparalled in the history of congressional legislation." *Id.* at S14518 (Senator Colt). Senator Reed's proposal was subsequently modified to give the Attorney General of the United States the power to control and even terminate the state-initiated litigation, but even in its weakest form the amendment was rejected. 51 Cong. Rec. S14527 (daily ed. Sept. 1, 1914).

The history of Senator Reed's proposal is significant for three reasons. *First*, it demonstrates the Senate's understanding that section 16, as drafted, did not permit state attorneys general to sue for the *same* relief available to the federal government—including post hoc structural relief. *Second*, the defeat of Senator Reed's proposal demonstrates a congressional intent to deny that power to state attorneys general. See *e.g.*, *Philbrook* v. *Glodgett*, 421 U.S. 707, 718-19 (1975); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 732-33 (1975). *Third*, the floor debates over the proposal indicate that the Senate's decision to reject Senator Reed's amendment was based upon compelling policy concerns, which would be contravened by the interpretation of section 16 advanced by petitioner.

4. The Clayton Act was reported out of the conference committee on September 25, 1914, without any modification of section 16. H.R. Rep. No. 1168, 63d Cong., 2d Sess. (Sept. 25, 1914) (conference report).

During the House debates on the conference report, Representative Floyd, defended the proposed Act against charges that it did not go far enough. He gave the following explanation of section 16:

> Heretofore there has been only one power that might enjoin an unlawful trust or monopoly in restraint of trade, and that was the Government of the United States . . .
>
> This provision in section 16 gives any individual, company, or corporation, damaged in its property or business by the unlawful operation or actions of any corporation or combination the right to go into court *and enjoin the doing of these unlawful acts*, instead of having to wait until the act is done and the business destroyed *and then sue for damages*. That clause in the provision of this bill makes it specifically applicable to section 2, 3, 4, 7, and 8 of the bill; so that if a man is injured by a discriminatory contract [section 2], by a tying contract [section 3], by the unlawful acquisition of stock of competing corporations [section 7], or by reason of some one acting unlawfully as a director in two banks or other corporations [section 8], he can do into any court and enjoin and restrain the party from *committing such unlawful acts* or sue for his damages, without regard to the amount in controversy, and recover threefold damages.

51 Cong. Rec. at H16319 (daily ed. Oct. 8, 1914) (emphasis added). By indicating that section 16 permits only injunctions against the "doing" or "committing" of unlawful acts, such as the acquisition of a competitor's stock, Floyd's description excludes the possibility of post hoc, mandatory structural relief, including divestiture. Nowhere did he mention the "undoing" of *past* illegal acts, even though he specifically mentioned the anti-merger provisions of section 7.[23]

B. Nothing In The Snippets Of Legislative History Relied Upon By Petitioner Supports The Availability Of Post Hoc Structural Remedies Under Section 16.

1. Petitioner cites only one passage from the voluminous legislative history of the Clayton Act, a colloquy between Senators Nelson and Shields. According to petitioner, that colloquy indicates that Congress intended to give private litigants *all* of the remedial authority granted to the federal government in section 4 of the Sherman Act. Pet. Br. 39. But petitioner's interpretation of Senator Nelson's statement is directly contradicted by one of Senator Nelson's later statements, not cited by petitioner,

---

[23] Representative Webb also stated during the conference report debates that "anybody who is threatened by any loss or damage by reason of any *act* denounced in this bill or in the Sherman anti-trust law . . . can go into courts of equity and *restrain those acts* which seem imminent in threatening him with loss or damage. . . ." 51 Cong. Rec. at H16275 (daily ed. Oct. 7, 1914) (emphasis added).

during the floor debates on the conference committee bill. Alluding to the dissolution remedy that had been discussed at length in the House, Senator Nelson stated:

> Does it not strike you, Senators, as a little unfair that by section 16 of this bill you have for the first time given private individuals the right to go into court and get injunctive relief as the Federal Government can get it, and then, after having given private individuals this remedy by injunction, *you deprive them of part of the remedies that the Federal Government has in a suit instituted by it.* . . . [T]hat is a grave discrimination between the Government and the private litigant.

51 Cong. Rec. at S15946 (daily ed. Sept. 30, 1914) (emphasis added). Though he would have liked the result proposed by petitioner, Senator Nelson clearly did *not* believe (contrary to petitioner's assertions, Pet. Br. 38-40) that section 16 would provide private litigants with the same authority to seek *any kind* of equitable relief that the Government enjoys under section 15 of the Act. This statement is the complete answer to the only piece of legislative history petitioner cites in suppport of its interpretation of section 16.[24]

2. The First Circuit in *CIA. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985) (whose analysis petitioner appears to adopt by reference, Pet. Br. 37) relies principally upon three pieces of legislative history. The first is a *minority* report on the proposed Clayton Act by Representative Graham of Pennsylvania. Graham believed that "business should have a rest from further legislation and be given an opportunity to adjust itself to the environment created by the existing

[24] Moreover, Senator Nelson's statement (in the passage quoted by petitioner) that section 16 gives "the same remedy . . . to private parties as was given to the Government" (Pet. Br. 38) is explicitly limited to "injunctive relief" and "injunctive process," as is the statement by Senator Nelson quoted above. And the statement by Senator Shields merely states that section 16 permits private parties, like the federal government, to "bring suits in equity" against antitrust violators, without discussing the *remedies* available to the two classes of plaintiffs. Pet. Br. 39.

antitrust laws," and, accordingly, that section 16 went too far:

> The provision giving to any individual the right to enjoin any threatened loss or damage by reason of any violation of the antitrust laws is a very serious one. . . . The beginning of an investigation by the government on any complaint that a concern has violated the antitrust law, almost immediately to some extent affects his credit but not so seriously as an application for an *injunction, and perhaps a receivership, which might be brought by an individual.*

H. Rep. No. 627, Pt. 2, 63d Cong. 2d Sess. 10 (May 12, 1914) (emphasis added). The First Circuit relies upon the final passage for the proposition that "some committee members believed dissolution and corporate reorganization would fall within the scope of § 16 'injunctive relief.'" 754 F.2d at 422. No such inference is warranted. The passage is not, as the court suggests, a "specific explanation of the meaning of the private injunction provision." *Id.* at 422 n. 21. Nor does it even state that section 16 should "perhaps" permit a private plaintiff to sue for "receivership"; it merely states that private suits for injunction or for receivership are recognized to have a more serious effect on a business's credit than a federal antitrust investigation.

And even if this minority report could be reasonably interpreted as indicating a belief that section 16 *might* permit an individual to bring a suit for dissolution, that belief, coming as it did from an opponent of the legislation, is entitled to no weight. *E.g.*, *Shell Oil Co.* v. *Iowa Dept. of Revenue*, 109 S.Ct. 278, 284 (1988); *Edward J. DeBartolo* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S.Ct. 1392, 1402 (1988); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 483 (1981); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951). As this Court has noted in an analogous context, opponents of legislation may, "[i]n their zeal to defeat a bill . . . understandably tend to overstate its reach." *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964).

3. The next statement relied upon by the First Circuit is an explanation by Representative Carlin of section 16's purpose:

> [W]e have started with the individual, by giving him rights that he has never possessed under the law—not for the injury of another, but for the protection of himself.
>
> First, we found that the Sherman law did not permit an injunction on petition of an individual. The Government could enjoin a combination or trust; and though an individal was standing face to face with destruction, though the monster of monopoly was knocking at his door, he would have to wait until destruction came, and then pursue his remedy at law for treble damages. So . . . the committee, propose to place in this bill a law which allows the individual to sue for equitable relief and to enjoin monopoly when he is threatened with irreparable loss or damage.

51 Cong. Rec. H9270 (daily ed. May 26, 1914) (emphasis added). Despite the First Circuit's suggestion that this statement draws a "parallel between the government's and the individual's right to enjoin antitrust violations" (754 F.2d at 424), the statement nowhere states or implies that private plaintiffs are to be given *all* of the equitable relief available to the federal government; it mentions only the power to "enjoin monopoly." Indeed, the first sentence of this passage indicates Representative Carlin's understanding that the remedies available under the private-injunction provision did not include the right to sue for broad post hoc structural remedies, which would necessarily go beyond a plaintiff's merely "protect[ing] himself." Moreover, it is clear from Representative Carlin's exchanges on the subject of dissolution with Messrs. Untermyer, Levy, Rogers and Brandeis during the hearings that Carlin did not believe section 16, as drafted, would extend to post hoc structural relief. See *supra* at 25-30.

4. The First Circuit also relies upon a Senate amendment (proposed section 25) that would have *required* a district court to dissolve any defendant found guilty of monopolization, through the appointment of a receiver and the winding up of the defendant's affairs.[25] When it became clear that this amendment would be defeated, a substitute was proposed making receivership optional. Although the First Circuit interprets the defeat of this modified amendment—which, unlike the original, was explicitly limited to "suits brought by the United States"—as an indication that Congress did not intend to limit the dissolution remedy to the federal government, no such inference is warranted, for two reasons:

First, this modified version of section 25 was rejected not because it was limited to the federal government, but because it was an unnecessary statement of existing law. Although there had originally been some question whether a court had the authority to dissolve a combination found to be in violation of the Sherman Act, the *American Tobacco* decision clearly had indicated that the courts have that authority. *United States* v. *American Tobacco Co.*,

---

[25] The proposed amendment provided that "whenever a corporation shall . . . be adjudged to be a monopoly or combination in restraint of trade," the court rendering the judgment must "decree its dissolution," "appoint receivers to wind up its affairs and . . . cause all of its assets to be sold." 51 Cong. Rec. S15863 (daily ed. Sept. 28, 1914). The First Circuit cites this proposal as indicating "greater conflict over the meaning of 'dissolution' than the Ninth Circuit acknowledges" 754 F.2d at 424, with some legislators apparently believing that "dissolution" could be accomplished through an order requiring a monopolist to divest itself of sufficient assets to deprive it of its monopoly status, and other legislators believing that "dissolution" necessarily included "the winding up of a corporation, or its general termination." *Id.* This provision, however, merely indicates disagreement as to the appropriate *method* for dissolving an illegal trust, not disagreement as to the meaning of the term "dissolution" in the equity jurisprudence of the day. Many legislators were unhappy with the remedies ultimately ordered in the *Standard Oil* and *American Tobacco* cases—both of which were described by the Court as "dissolutions"—and therefore attempted to make mandatory what they sometimes referred to as a "real" dissolution. Indeed, section 25 was itself entitled a "bill to provide for the *real* dissolution of trusts." 51 Cong. Rec. S15863 (daily ed. Sept. 28, 1914).

221 U.S. 106, 185-186 (1911). Thus, the apparent sponsor of the modified version of section 25, Senator Nelson, stated that the purpose of that provision was "to settle the *mooted question* of the equity power of the court to partition and sell the assets of an adjudged monopoly." 51 Cong. Rec. H16326 (daily ed. Oct. 8, 1914) (emphasis added); see also 51 Cong. Rec. at S16052-53 (daily ed. Oct. 1, 1914) (Senators Culberson and Norris).[26]

Second, it is far from clear that the addition of the reference to "suits brought by the United States" was intended as a substantive change. In proposing the original version of section 25, Senator Reed began by observing that the principal problem with previous federal enforcement of the Sherman Act was the Justice Department's "failure to insist upon a real dissolution of monopolies and combinations." 51 Cong. Rec. S14527 (daily ed. Sept. 1, 1914). He then stated that the purpose of his proposal was to ensure that "hereafter when we shall *prosecute* a combination . . . there shall be a real and not a pretended dissolution." *Id.*; see also 51 Cong. Rec. S15864 (daily ed. Sept. 28, 1914) (Senator Reed) (purpose of section 25 was to ensure that a "real" dissolution is effected in suits brought by the Department of Justice). This description suggests that Senator Reed, as well as most of the Senators who voted in favor of the original version of section 25, understood that it would be limited to suits brought by the federal government.

C. Congress Reaffirmed In 1976 That Non-Federal Plaintiffs Do Not And Should Not Have The Authority To Seek Post Hoc Structural Remedies.

Petitioner's view of Congress's intent in enacting section 16 is further undermined by the history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Among other things, that Act granted to states statutory

[26] Indeed, Brandeis had proposed a similar provision during the hearings, not as a way of limiting the dissolution remedy to the federal government, but as a way of "educating" the federal courts by making clear their authority to order divestiture in suits brought by the federal government. See *House Hearings* at 652.

parens patriae standing in treble damage actions for violations of the Sherman Act. See Pub. L. No. 94-435, § 301, 90 Stat. 1890 (1976). The Senate version of the bill, however, had granted states the authority to seek "monetary *and other relief*." S. 1284, 94th Cong., 1st Sess. § 401 (1976). The Senate report discussing this provision stated:

> Present section 16 of the Clayton Act allows private suitors "injunctive relief against threatened conduct that will cause loss or damage" by a violation of the antitrust laws (15 U.S.C. § 26). [*The Senate bill*] *is intended to insure the court's power to grant any kind of appropriate relief, including rescission, restitution and divestment*, which may be appropriate remedies under certain circumstances, whether or not it fits within the traditional concept of "equitable relief" or "injunctive relief."

S. Rep. No. 803, 94th Cong., 2d Sess. 45 (1976) (emphasis added). The House version of the bill authorized only damages.

The conference committee sided with the House. Representative Rodino explained the conference committee's action as follows:

> [T]he compromise bill omits any reference to [injunctive relief] solely because such relief is already available to State attorneys general, acting as parens patriae in injunctive actions under [section 16]. The compromise bill, therefore, in no way alters the current case law on parens patriae injunctive relief. Provision for [broader] equitable relief, that is, decrees of divestiture, was squarely rejected by the House conferees in the belief that *State attorneys general should not be authorized to file parens suits seeking divestiture.*

122 Cong. Rec. H10295-96 (Sept. 16, 1976) (emphasis added). Particularly in light of the fact that the Hart-Scott-Rodino Act was an amendment to the Clayton Act, the views of the 94th Congress as to the meaning of section 16 are entitled to substantial weight. See, *e.g.*, *Bell* v. *New Jersey*, 461 U.S. 773, 784 (1983); *Seatrain Ship-*

building Corp. v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *cf. Red Lion Broadcasting Corp.* v. *FCC*, 395 U.S. 367, 380-81 (1969). The statement by Representative Rodino, a sponsor of the Hart-Scott-Rodino Act, demonstrates that the 94th Congress understood the language of section 16 to preclude suits for divestiture and other post hoc equitable relief, and deliberately chose to leave it that way.

• • •

The legislative history of the Clayton Act thus proves that Congress unambiguously intended precisely what the language of section 16 unambiguously says—namely, that the equitable remedies available under that provision include only the power to prevent threatened illegal acts, not the power to undo completed transactions. Congress refused in 1914 to give that power to private parties (including State attorneys general) in part because Congress believed it could be safely conferred only upon the federal government. Indeed, Congress reaffirmed that policy conclusion—as well as its own prior understanding of section 16—in 1976 when it refused to grant State attorneys general the authority to sue for divestiture under the Hart-Scott-Rodino Act. In sum, Congress's consistent judgment has always been that, for anyone other than the federal government, the proper remedy for an already-completed antitrust violation is a treble damage action.

IV. Policy Considerations Counsel Against Interpreting Section 16 To Permit Non-Federal Plaintiffs To Seek Structural Relief.

Petitioner relies almost exclusively on "policy" arguments in favor of a broad reading of private injunctive authority under section 16. See Pet. Br. 10-37. But the question whether petitioner's interpretation of the statute is a good idea, as a matter of federal antitrust policy, is something that not only *should* be left to Congress, it *has* been decided by Congress on two occasions. And even if petitioner's policy arguments were appropriately addressed to this Court, they are unpersuasive,

for reasons explained below and by respondents' *amici*. Under petitioner's interpretation of section 16, all antitrust plaintiffs—including competitors, suppliers, customers and consumer groups as well as states—will be empowered to seek divestiture, dissolution and other post hoc structural remedies in every kind of antitrust case. The potential for abuse such a holding would create, its certain detrimental impact on federal merger enforcement, and the existence of ample alternative avenues (including state law) for redressing antitrust violations by non-federal plaintiffs, all compel the conclusion that Congress struck the proper balance in 1914 and in 1976, when it limited such remedies to federal enforcement actions.

1. What is most striking about petitioner's policy arguments is their similarity to the arguments unsuccessfully advanced during the congressional deliberations that led to the Clayton and Hart-Scott-Rodino Acts. Like petitioner, Messrs. Untermyer and Rogers argued that private plaintiffs should have the authority to seek post hoc structural relief because a prohibitory injunction might not provide "complete relief" (Pet. Br. 21) or be sufficient to "achieve the objectives" of the antitrust laws (Pet. Br. 14). See *supra* at 26-29. But Representative Carlin and others persuaded a majority in Congress that prohibitory relief would serve those objectives sufficiently, and that broader remedial authority would be too susceptible to abuse if placed in the hands of private plaintiffs. *Supra* at 29. Like petitioner, Senator Nelson argued that it would be unfair to give the federal government authority to seek affirmative remedies while depriving private plaintiffs of their "right to effective relief" (Pet. Br. 35) and denying them the ability to "address[] the structural nature" (Pet. Br. 21) of an already-completed antitrust violation. See *supra* at 35-36. But Brandeis and others persuaded a majority of Congress that it was entirely appropriate to give the federal government full responsibility for determining when post hoc structural relief should be sought. *Supra* at 29.

Like petitioner, moreover, Senator Reed argued that state attorneys general should be permitted to "fill the gaps" in federal antitrust enforcement (Pet. Br. 25, 27, 35)—and, indeed, to "serve as a check on" federal enforcement authorities (Pet. Br. 35). But Senators Gallinger and Lewis successfully argued that enforcement of the federal antitrust laws should be left to federal enforcement authorities, and that the crazy-quilt enforcement system proposed by petitioner could well lead to politically-motivated enforcement decisions that would "gr[ind the public] between the upper and the nether millstones." *Supra* at 33. Finally, like petitioner, some legislators argued in 1976 that state attorneys general should be given divestiture authority so that they could play a greater role in merger enforcement (Pet. Br. 29). *Supra* at 40-41. But Representative Rodino apparently persuaded a majority of the 94th Congress to reject that proposal as well. *Supra* at 41.

In sum, petitioner merely seeks to have this Court reconsider a divisive issue of antitrust policy that has *twice* been squarely addressed and decided by Congress—once in 1914, and again in 1976. Congress's repeated decisions not to grant any non-federal plaintiffs the same remedial authority as the federal government plainly disposes of petitioner's "policy" arguments. As this Court has previously observed, if "considerations of public policy counsel the extension of the Clayton Act, . . . it is a simple matter for Congress to say so clearly." *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 133 (1983).

2. This Court, moreover, has previously recognized that there are good reasons to "sharply distinguish" federal antitrust enforcement actions from private suits. *United States* v. *Borden*, 347 U.S. 514, 518 (1954). Only the federal government has both the resources and the responsibility to ensure that powerful, post hoc structural remedies such as divestiture and dissolution are properly administered and not abused. As this Court is well aware, antitrust decisionmaking by the federal courts requires difficult and delicate judgments concerning com-

petitive conditions and future economic performance. See *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963); Report of the Attorney General's National Committee to Study the Antitrust Laws, 356 (March 31, 1955); Areeda & Turner, *Antitrust Law* § 312a at 36-37 (1978). The need for well-informed and considered discretion is particularly great when the court considers a structural antitrust remedy, which can drastically affect not only the conduct and pocketbook of an individual defendant, but also the entire market. For this reason,

> [F]ar-reaching rules of antitrust liability make sense and are administrable in practice only when there is a responsible filtering of (1) the cases presented to the court or (2) the company and industry reorganizations proposed. . . . [O]nce an antitrust violation has been found, the government is more likely than the private plaintiff to have the resources, the competence, and the motivation to propose wise remedies. This is especially important when dissolution or industry reorganization is in issue.

Areeda & Turner at 36-37 (1978). See also *United States* v. *United Shoe Machinery Corp.*, 110 F.Supp. 295, 348 (D. Mass. 1953).

Private divestiture suits would deprive the courts of the "responsible filtering" provided by the federal government.[27] A private suit for divestiture *after* federal approval and completion of an acquisition allows a competitor, or any other party, not only to threaten to destroy a transaction that may be vital to the corporation's economic future, but also to impose substantial unnecessary

[27] This case is illustrative: A merger between the second and third largest California grocery chains—Von's and Safeway's—was pending before the FTC at the same time as the Lucky/Alpha Beta merger at issue here, with both mergers producing virtually identical market shares. ER 616. The FTC's even-handed treatment was reflected in the fact that the agency required similar numbers of divestitures in both cases. The California Attorney General, however, inexplicably chose to challenge the Lucky/Alpha Beta merger while refusing to challenge the Von's/Safeway merger.

costs.[28] Even if the defendant corporation is confident that the merger is procompetitive and that it will eventually prevail in litigation, the uncertain promise of a future victory does "not prevent the error that is introduced when the threat of litigation by an improperly motivated plaintiff causes the parties to forgo or modify transactions." ABA Antitrust Section: Monograph No. 16, Private Litigation Under Section 7 of the Clayton Act: Law and Policy 81 (1989). See Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 267 (1985). The nuisance value of a lawsuit, moreover, is infinitely greater when the remedy sought is not mere money damages, but the "undoing" of a major transaction or, indeed, the complete dissolution of the defendant. And the threat of litigation becomes unbearable when a newly-merged company faces the possibility of *seriatim* divestiture actions by numerous plaintiffs in every state in which the company does business, as it would if the divestiture remedy were extended to all plaintiffs.

Indeed, the California Attorney General has correctly observed that, if he is successful in this case, "consumers' representatives across the country will be able to go to court to undo illegal mergers." Washington Post, Oct. 17, 1989, at D6, col. 3. Of course, that means that "consumers' representatives"—each with his or her own agenda

[28] Obviously, a suit to halt a merger prior to completion gives rise to *some* of the same concerns. But, when a merger is interrupted by litigation before it has been completed, the costs to the company are much lower because the acquiring company has not yet purchased the acquired company, for which it frequently pays a premium. And other social costs, including the disruption to the company's employees, are reduced when antitrust challenges are aired before the merger. In this case, for example, had the complaint and request for injunctive relief been filed prior to approval of the consent decree, respondent certainly would not have divested itself of assets necessary to operate Lucky and Alpha Beta as separate, viable grocery chains. See *supra* at 4 n. 3. Thus, the CAG's decision to delay a lawsuit until after the merger will (if the CAG ultimately prevails) necessarily leave one or both of the merging chains financially weaker than before the merger.

and antitrust theory—also will be able to go to court to *threaten* to undo mergers. Given the imprecise nature of antitrust decisionmaking, the complex economic and legal judgments involved, and the "public importance of pre-litigation fact-finding and the exercise of discretion by the public 'prosecutor' " (Areeda & Turner, § 312d at 40), this Court should preserve the distinction Congress created between the remedial authority of the federal government and that of all other plaintiffs.

3. Failure to limit the structural remedies of dissolution and divestiture to cases brought by the United States would also have a substantial and detrimental impact on federal merger enforcement under the Hart-Scott-Rodino Act. To a large degree, the present ability of federal antitrust authorities to negotiate a settlement derives from the fact that they have the final word on whether a transaction will be challenged after the fact. If every private plaintiff, state attorney general and public interest group shared the federal government's ability to "undo" a transaction, the federal government's bargaining power in such negotiations would be substantially reduced.[29] Such a result would also destroy the predictability in merger enforcement which Congress sought to provide when it enacted the Hart-Scott-Rodino Act. See S. Rep. No. 803, 94th Cong., 2d Sess. 65 (1976); H.R. Rep. No. 1373, 94th Cong., 2d Sess. 11 (1976).

There is no merit to petitioner's argument that overruling the Ninth Circuit's no-divestiture rule will further

[29] This case illustrates the point: If respondents had known that they could be subject to a suit for divestiture after consummating their merger (contrary to well established Ninth Circuit law), they could not rationally have agreed to a consent agreement requiring them to divest substantial numbers of stores. As previously noted (*supra* at 4 n. 3), the divestiture of respondents' stores pursuant to the FTC consent agreement made it financially impossible to maintain two separate grocery chains. A prompt integration of the two chains was therefore essential to respondents' willingness to reach agreement with the FTC.

the aims of that Act. Contrary to petitioner's suggestions (Pet. Br. 35, 36 & n. 15), the no-divestiture rule does not force private litigants to ignore the Hart-Scott-Rodino premerger review process. As a practical matter, it simply requires all interested parties to negotiate and reach agreement before the merger is consummated. Nor is there any reason to permit private parties to use divestiture suits as a way of "punishing" (Pet. Br. 29) those who violate the Act. The Act itself provides ample civil penalties for violations. See 15 U.S.C. § 18A(g); von Kalinowski, *Antitrust Laws and Trade Regulation* § 20.07[2] (1989) (discussing penalty cases brought by Justice Department). Nor is there any evidence that federal enforcement agencies are "overwhelmed" (Pet. Br. 30) by their premerger review responsibility. *This* case, for one, received full review by the FTC, but petitioner simply disagreed with the FTC's decision. This case thus illustrates the balkanization of merger enforcement that can result from the application of divergent economic and social theories of antitrust policy by federal and state officials—a balkanization that becomes intolerable when an already-completed transaction is at stake. See Rill, *Antitrust: Where We Stand Today*, 57 Antitrust L.J. 3, 6 (1988) (article by Assistant Attorney General, Antitrust Division).

4. Contrary to petitioner's submission (Pet. Br. 14-37), a decision rejecting the interpretation of section 16 urged by petitioner in no way leaves plaintiffs with legitimate antitrust claims unable to protect their interests. Private plaintiffs remain free to seek treble damages. They also remain free, under section 16, to enjoin any *threatened* conduct that they believe may cause them injury, including a threatened merger. All that non-federal plaintiffs are precluded from seeking is broad, post hoc structural relief such as dissolution or divestiture. And the federal government, of course, remains free to challenge the merger or acquisition at any time. *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). See also Respondents' Brief In Opposition 16-19

(Sept. 20, 1989) (explaining why post-merger divestiture unnecessary to protect legitimate interests of private litigants).

Nor does a ruling in this case that section 16 does not grant mandatory relief or in any way preclude the State of California—or any other state—from granting such relief under state law. This case, therefore, involves no issue of federalism. *If* the remedy of divestiture truly is a necessary weapon in the California Attorney General's antitrust arsenal, the California legislature should be willing to enact legislation granting that remedy to him.[39] If such a remedy is to be granted under federal law, however, it must be granted by Congress.

---

[39] Indeed, the California Attorney General recently proposed legislation that would have extended California's antitrust law to mergers and would have permitted the CAG to seek divestiture. See A.B. 672, 1989-1990 Cal. Reg. Sess. That proposal, however, was defeated in committee. Several state laws presently contain such provisions, however, and those laws have been applied by state attorneys general to obtain divestiture. See ABA Antitrust Section, Monograph No. 15, Antitrust Federalism: The Role of State Law, 61-62 (1988); *Texas* v. *Coca-Cola Bottling Co.*, 697 S.W.2d 677 (Tex. App. 1985); Me. Rev. Stat. Ann. tit. 10, § 1104(2) (1989 Cum. Supp.) (state statute virtually identical to section 15). According to petitioner, antitrust enforcement (including actions seeking divestiture) under state law has been "vigorous." Pet. Br. 28. Respondents express no views as to the propriety or constitutionality of such state statutes.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DONALD B. HOLBROOK
KENT T. ANDERSON
AMERICAN STORES COMPANY
5201 Amelia Earhart Drive
Salt Lake City, Utah 84116
(801) 539-4421

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
GENE C. SCHAERR
JULI E. FARRIS
THOMAS P. VAN WAZER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Counsel for Respondents

* Counsel of Record

December 1, 1989